

**OPINION
72-43**

April 20, 1972 (OPINION)

Mr. John C. Haugland

City Attorney

Devils Lake, ND

RE: Cities - Initiated Ordinances - Validity

This is in response to your letter of April 11, 1972, enclosing an initiated ordinance of your city that was passed by a majority of the electorate of your city voting on the matter on the April 14, 1972, election.

You indicate that you would appreciate our reviewing the ordinance and advising whether in our opinion the ordinance is legal and whether the city commission is obligated to abide by same, taking into consideration all of the other laws of the State of North Dakota.

You furnish no other information in your letter, enclose what is apparently a copy of the initiated ordinance, and what is either a copy of the petition to initiate municipal ordinance and qualified elector's affidavit, or a part thereof.

We are, of course, not familiar with such factors as the remainder of the ordinances of the city, the surrounding facts and circumstances as to the garbage collection facilities in the city, the historical background thereof, etc., so would be very hesitant to issue a blanket opinion, holding that regardless of other ordinances of the city, surrounding facts and circumstances, historical background, etc., same is or is not legal. However, we believe we can recognize the basic problems inherent in such an ordinance and comment on same.

It would be very unusual to find such provisions in a state statute, in view of the provisions of subsection 20 of Section 69 of the North Dakota Constitution. The ordinance would definitely by its terms appear to be special legislation, in that it specifically deals with a named individual given privileges thereunder. The franchise given is special, though it does not, in terms of the ordinance forwarded to us, purport to be exclusive.

We note specifically that the governing body of the city by subsection 57 of Section 40-05-01 of the North Dakota Century Code is given authority to grant franchises or privileges to persons, associations or corporations, and that any such franchise except when given to a railroad company, to extend for a period of not to exceed twenty years and to regulate the use of the same franchises granted pursuant to the provisions of Title 40, not to be exclusive or irrevocable but subject to the regulatory power of the governing body.

The initiated ordinance by its terms does not purport to grant an

exclusive franchise, or to forbid granting or other franchises, it merely provides that the granting of any further permits or rights to collect, handle or dispose of garbage, refuse and rubbish in the city shall be granted only by appropriate ordinance. There might be some problem as to how this ordinance could be revoked - note the provision of the last sentence of Section 40-12-07 of the North Dakota Century Code to the effect that any ordinance proposed by a petition and adopted by a vote of the people cannot be repealed or amended except by a vote of the people so long as the municipality remains under the commission system of government, however, there would appear to be nothing in the ordinance to indicate that the franchise is as specified in said Section 40-05-01 "irrevocable," except, of course, to the extent that it would constitute a valid and binding contract.

We do note that Section 1 of the initiated ordinance does purport to grant "the right" to the individual named therein, though we think it questionable that the use of the article "the" necessarily implies that the right might be construed as exclusive.

We note that Section 3 of the ordinance provides for deposit in the Sanitary Landfill Disposal Site and that the charges for such deposits should be one thousand dollars for every three months. We do not have enough background material to determine whether the thousand dollars for such deposits is to be paid by the individual to the city, or from the city to the individual. Assuming, however, that same is a fair, just and reasonable charge presumably same would be legal and valid, though we must, of course, note that Section 185 of the North Dakota Constitution forbids any city to "make donations" to or in aid of any individual with exceptions not applicable here. Any legal attack on the validity of this provision would, of course, be necessarily dependent on proof that such charge was so unreasonable as to constitute a "donation."

Section 4 of the proposed ordinance apparently recognizes the continuation of the right of the city to regulate the service rendered under its police power authority to preserve health, and sanitation of the facilities for the benefit of the public.

Section 5 of the ordinance purports to set the fee for the service to be charged by the named individual. Whether or not same is or is not reasonable would probably not affect the validity of the ordinance as same does not appear to require the charge to be paid by all inhabitants, citizens, structures or lots to accept the service, rather, Section 6 of the ordinance purports to have the service available from the named individual to all "applicants." We would assume under such provisions of the ordinance if a particular inhabitant, citizen, structure or lot, felt a lower rate was available from elsewhere, such inhabitant, citizen, structure or lot could simply not make application for the service provided for in the ordinance, would thus not be an "applicant" and would thus not receive services. On such basis reasonableness of the charge would probably not affect validity of the ordinance. We should probably point out in this respect, however, that we are not suggesting that the charge specified in the ordinance is not reasonable.

We see no objection to the insurance provisions of Section 7 of the

ordinance. Section 8 is merely a severability clause. We are not familiar with the provision of the ordinances superseded and repealed by Section 9 of this ordinance thus can hardly comment on the validity of such supersession or repeals. We know of no legal objection to the effective date, as specified in Section 10 of the ordinance. We would assume that the specification set out in Section 11 would be the situation, without the provisions of Section 11 of the ordinance, and assume that the provisions of Section 11 were only intended to clarify the situation in this regard.

The form of petition and affidavit attached appear to be substantially in accordance with the provisions of Title 40-12 of the North Dakota Century Code. It rather surprises us if 17 voters would constitute 15 percent of the votes cast for all candidates for the executive officer at the preceding regular municipal election, as specified in Section 40-12-02 of the North Dakota Century Code, in a city the size of yours, on the other hand, such could be the case, or conceivably the sheet forwarded to us could be one of several sheets bearing signatures to the petition.

In conclusion we would therefore state that we see no legal objection to the validity of the ordinance in the material forwarded to us, and assuming that same is the only available material on the subject relevant and material to the situation, we would conclude that same is now a legal, valid and binding ordinance of your city, to which the city commission, and others within its jurisdiction are subject. We could add that in the usual instance where a contract for such services could be let on a competitive basis, we would generally recommend that same be let on such competitive bids. In this instance, however, it would appear that the city by this ordinance is offering a franchise to this particular individual which if accepted would be valid and binding as to both parties thereto.

HELGI JOHANNESON

Attorney General